United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1424 ORIGINAL

To be argued by
IRVING SHAFRAN

B P/S

In The

United States Court of Appeals

For The Second Circuit

JAMES CASHIN AS SECRETARY-TREASURER OF LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (A.F. of L.-C.I.O.) ON BEHALF OF AND FOR THE BENEFIT OF ITS MEMBERS,

Plaintiff-Appellant,

vs.

WILLIAM SPENCER & SON CORP.,

Defendant-Appellee.

Appeal from a Summary Judgment in the United States District Court for the Southern District of New York at No. 72 Civ. 4946; Sat Below: Tyler, U.S.D.J. (without a jury).

BRIEF FOR PLAINTIFF-APPELLANT

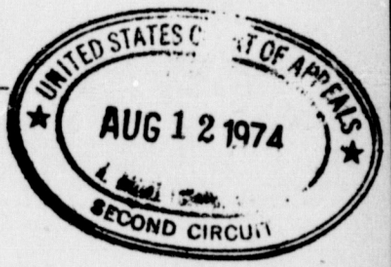

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TABLE OF CITATIONS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES CASHIN, as Secretary-Treasurer of Local 1804-1, International Longshoremen's Association, (A. F. of L. - C. I. O.) on behalf of and for the benefit of its members,

Plaintiff - Appellant,

vs.

WM. SPENCER & SON CORPORATION,

Defendant - Appellee.

Docket No. 74-1424

BRIEF FOR APPELLANT

STATEMENT OF ISSUE PRESENTED

1. Did the District Court err in granting defendant-appellee's motion for summary judgment where a genuine issue of a material fact was raised involving the parties course of dealing over a period of years, where defendant - appellee had foreclosed plaintiff - appellant's ability to perform under the contract and where plaintiff - appellant was prevented, by the granting of the motion, the opportunity to obtain disclosure?

PREFATORY STATEMENT

This is an appeal from the granting of summary judgment dismissing appellant's complaint on the merits, which judgment was granted in the United States District Court for the Southern District of New York by the Honorable Harold R. Tyler, Jr., and entered on February 1, 1974.

Local 1804-1, International Longshoremen's Association, A.F.L. - C.I.O. (hereinafter referred to as "plaintiff" or "the Union") commenced this action in October, 1972, for the recovery of $114,361.60, representing paid holidays pursuant to a collective bargaining agreement covering the period from October 1, 1968, through September 30, 1971.

Pursuant to the terms of the collective bargaining agreement dated February 20, 1969, and a 1970 amendment thereto, Union members, in order to gain paid holiday benefits, were required to work 570 hours for an employer in one fiscal year and not less than 4 hours for the same employer in the following year (the year in which the holiday fell and the year in which the employee would be paid).

Wm. Spencer & Son Corporation (hereinafter referred to as "defendant" or "Spencer") employer Union members for many years through the period ending September 30, 1971, when it terminated its stevedoring business.

The Union seeks recovery of the amounts due under the relevant provision of the contract for the paid holidays of the 214 members involved who had worked for Spencer in the last year of the contract, i.e., October 1, 1970 through September 30, 1971, contending that such benefits had already vested in its men and the course of dealing between the parites, if allowed to be shown by pre-trial disclosure, but which had been precluded by the motion for summary judgment, would have proven this to be the case.

STATEMENT OF FACTS

The Union represents harbor workers in the Port of New York known as "Chenango" laborers. These Chenango laborers were employed by the harbor carriers in the Port, one of which employer was Spencer.

(Numbers appearing in parenthesis refer to pagination of the Appendix)

Spencer was a party to a collective bargaining agreement (2a) with the Union, dated February 20, 1969, covering the period from October 1, 1968, through September 30, 1971, as thereafter amended on February 23, 1970 (2a).

The relevant provision of the contract, paragraph "7", as amended, states in part, as follows:

> "Such paid holidays shall be granted to regular employees (defined as employees who have worked not less than 570 hours for one employer herein in the fiscal year ending September 30th of the year preceding the year in which the holiday falls) who work for the same employer not less than 4 hours in the work week in which the holiday falls; such 4 hours to include any time worked on the holiday."

On September 30, 1971, the termination date of the contract, Spencer also terminated its stevedoring business.

POINT I

TRIABLE ISSUES OF FACT ARE PRESENTED WHICH MILITATE FOR THE DENIAL OF THE MOTION FOR SUMMARY JUDGMENT

There are manifest issues of fact in the within action, which militate for the denial of summary judgment. The resolution of those fact issues should be made at a plenary trial and not on a motion for summary judgment. It is the contention of the Union that the parties' understanding of the relevant provision of the agreement and their prior course of dealing, clearly would indicate that the provision had been interpreted otherwise than as expressed in its apparent clear wording.

When the course of dealing between the parties over a period of many years clearly shows that their intentions and interpretation of a contract is other than as set forth therein, parol evidence is admissible and summary judgment must be denied.

Of relevance to the present issue is the following statement by the Court in Treackle v. Pocahontas S.S. Co., 273 F. Supp. 608, aff'd. 406 F. 2d 412 (D.C. Va., 1967):

> "The surrounding circumstances at the time the contract was made including any prior course of dealings between the parties, is proper to consider in determining intent of the parties."

* * * *

> "It is well established that the interpretation placed upon a contract by the parties themselves, before a dispute has arisen, is entitled to the greatest weight."

On the same point was the pertinent statement in International Union of Mine, Mill and Smelter Workers, Local 515 v. American Zinc, Lead and Smelting Co., 311 F. 2d 656 (9th Cir., 1963):

> "What the parties meant by the words is a controlling issue of fact in this case, to be determined in a trial at which the parties may offer evidence in aid of their respective interpretations of the language used." (Emphasis supplied)

The actions of the parties with respect to their interpretation of a contract should be carefully scrutinized to resolve issues such as the one in question. "The practical interpretation which parties themselves placed on a contract is entitled to great weight in determining its meaning." Northwest

Acceptance Corp. v. Heinicke Instruments Co., 441 F. 2d 887, 889 (1971).

In even stronger language, the Court in In re Cut Rate Furniture Co., 163 F. Supp. 360 (D.C.N.Y., 1958), stated, "Conduct of parties is controlling despite written agreements."

It is plaintiff's contention that summary judgment should not be granted because of the dispute revolving around the parties prior course of dealing, which could only be brought out by means of pre-trial disclosure and a full trial of the issues. Summary judgment is a drastic remedy and should not be granted where there are conflicts of facts.

In Transcontinental Gas Pipe Line Corporation v. Borough of Middlesex County, 93 F. Supp. 283 (D.C.N.J., 1950), the Court cautioned trial courts in applications for summary judgment, as follows:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable;"

It is not being argued by the Union that Spencer was required to stay in business beyond the expiration date of the contract. However, it is being argued that Spencer, on one hand, received the benefits of having the 214 Union members work in the last year of the contract, and then on the other hand, foreclosed those same men from performing the second aspect of the relevant contract provision.

Every contract contains an implied condition that neither

party will hinder the other in the discharge of the obligations which the contract imposes on each. Where one of the parties has made it impossible for the second party to perform under a contract provision, the party causing the impossibility of performance has obviously caused the legal injury.

As the Court stated in Peter Kiewit Sons' Co. v. Summit Construction Co., 422 F. 2d 242, 257 (8th Cir., 1969):

> "It is hornbook law that an implied provision of every contract is that neither party to the contract will do anything to prevent performance thereof by the other party or commit any act that will hinder or delay performance."

It is further not being argued that Spencer was obligated to provide work if none existed; however, by terminating its stevedoring business, the men, who were ready, willing and able to perform services, were never even given the opportunity to do so. The situation is analogous to a man employed by a major corporation for 25 years and then given a gold watch and forced to retire at a still productive time in his life simply because the company sets an arbitrary age limitation for their employees.

In the case at bar, summary judgment was granted prior to any discovery procedures, which had been delayed by the making of the motion. Had such discovery procedures taken place, the Union would have had the opportunity to show the parties' interpretation of the relevant contract provision and their course of dealing in prior years regarding such provision.

Certainly, if such a drastic remedy as summary judgment is to be imposed, it should at least await the elimination of any doubt

that no triable or arguable issue exists. Here, by granting summary judgment prior to discovery procedures, which would not place a burden on the Court's time, the Union was not even able to elicit testimony which it could use in defending against the very motion for summary judgment.

In the instant case, where the burden shifted to the Union to show the existence of a genuine triable issue, the Union had already been prevented from coming forward with proof which was only producible through disclosure proceedings, by having those procedures prevented by the making of the within motion (3 a).

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

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A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

CASHIN,
Plaintiff-Appellant,

against

SPENCER & SON CORP.,
Defendant-Appellee.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Laurel N. Huggins, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1050 Carroll Place, Bronx, New York

That upon the 9th day of August 1974, deponent served the annexed Appellant's Brief upon **Kreisel, Beck & Halberg** attorney(s) for **Appellee** in this action, at **55 Liberty St., New York** the address designated by said attorney(s) for that purpose by depositing 2 true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 9th day of August 1974

Laurel N. Huggins

Print name beneath signature

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

LAUREL N. HUGGINS